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Supreme Court of the United States

No. [redacted] 135

MOVIECOLOR LIMITED,

Petitioner,

against

EASTMAN KODAK COMPANY, TECHNICOLOR INC. and TECHNICOLOR MOTION PICTURE CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT EASTMAN KODAK COMPANY IN OPPOSITION

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Supreme Court of the United States

No. 1021

MOVIECOLOR LIMITED,

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against

EASTMAN KODAK COMPANY, TECHNICOLOR INC. and TECHNICOLOR MOTION PICTURE CORPORATION,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Opinions Below

The opinion of the District Court is not reported and is printed at pages 6a-10a of the Record. The opinion of the Court of Appeals is not yet reported and is printed as Appendix A of the Petition.

Jurisdiction

The jurisdictional requisites are adequately set forth in the Petition.

Question Presented

Whether the Court of Appeals abused its discretion, under all the circumstances of this case, by affirming the dismissal of this action without giving petitioner a further opportunity to seek leave to amend the complaint.

Statutes Involved

No statute is involved in this appeal.

Statement

The merits of this litigation concern stale anti-trust claims asserted by a ghostly British corporate petitioner that disposed of its assets in 1931, was dissolved in 1939, and was reactivated in 1955.

The complaint alleges in essence that:

> In 1929 petitioner, a British corporation, acquired valuable rights to exploit a process of color photography (R. 18a). In 1930, respondents (including the Kodak respondent, upon whose behalf this brief is filed, and the two Technicolor respondents, who are separately represented) induced petitioner to enter into an agreement cancelling its exploitation licenses and permitting respondents to acquire control of petitioner (R. 21a). The same agreement provided for arbitration of the validity of the cancellation (R. 21a-22a). Thereafter, in 1931, respondents induced petitioner to enter into a further agreement that resulted in a final and complete cancellation of petitioner's licenses and their transfer to other parties (R. 24a).
>
> As a result of the foregoing, all of which was done by respondents in concert and pursuant to conspiracy, petitioner became insolvent and was dissolved in 1939 pursuant to Great Britain's Companies

Act of 1929 (R. 26a). In 1955 petitioner was restored on the Register and the legal incapacity resulting from its dissolution 16 years earlier was cured (R. 26a).

This action was commenced in 1959 (R. 1a). To any lawyer, the most striking thing about the complaint is the open invitation it extends to a defense based on the statute of limitations. When the complaint on its face makes clear that the most recent act giving rise to the alleged cause of action took place nearly 30 years ago, all concerned must reasonably foresee that the claim will be attacked in the first instance as time-barred. Both respondents made their attack by motion for judgment on the pleadings pursuant to Rule 12(c) of the Federal Rules of Civil Procedure (R. 6a).

Although the briefs are not part of the record before this Court, it is clear from the opinion of the trial judge that he was aware that the motions presented him with only two issues that were genuinely contested by the parties: (1) the general legal issue whether the federal equitable doctrine derived from *Bailey* v. *Glover*, 88 U. S. 342, 21 Wall. 342 (1847) and *Holmberg* v. *Armbrecht*, 327 U. S. 392 (1946), would operate to toll the running of a State's statute of limitations with respect to an action at law based on a federal right; and, (2) the more specific issue whether the factual allegations of the complaint in this case, construed in the light of the proceedings theretofore had, asserted fraudulent concealment of the alleged wrong with sufficient clarity to bring petitioner within the protective scope of the *Bailey/Holmberg* doctrine if the latter applied (R. 7a).

To remain in court, petitioner obviously had to win on both points. A victory for respondents on either point

would require dismissal of the complaint. The trial judge did not reach the question whether the complaint alleged fraudulent concealment. Preferring to rest his decision on the general legal issue, he decided that the *Bailey/Holmberg* tolling doctrine did not apply to an action at law, and accordingly granted the motions to dismiss on the ground that the action was barred by New York's statute of limitations (R. 10a).

The Court of Appeals disagreed with the trial court on that point, concluding that the *Bailey/Holmberg* concealment rule would mitigate the effect of a state statute of limitations upon an action at law, as well as upon suits in equity, before a federal tribunal in a case where a proper factual basis for invoking the doctrine existed. (App. A of Petition, pp. 18-25). But having done this, the Court of Appeals had still not decided the appeal, for the specific issue remained whether, viewed against the background of all the relevant circumstances, the allegations of the complaint provided a sufficient factual basis for invoking the doctrine. Indeed, that court explicitly recognized that it could have affirmed the trial court, and so disposed of the appeal, by deciding that issue alone, and without even discussing the scope of the *Bailey/Holmberg* doctrine (App. A of Petition, p. 19). But in order to resolve a conflict between two decisions by the same district court within its own circuit, the court below elected to make known its views with respect to the *Bailey/Holmberg* doctrine's availability in an action at law despite the fact that these views were irrelevant to deciding the appeal (App. A of Petition, p. 19).

Having expounded for the benefit of the district courts under its supervision the interpretation of *Bailey/Holmberg* it would insist upon in an action properly pre-

senting that issue, the Court of Appeals then turned to the case before it. Lengthy, detailed analysis of the complaint and the factual situation it described inevitably led the court below to conclude that fraudulent concealment was not alleged, and hence could not be relied upon to avoid the statutory bar (App. A of Petition, pp. 25-29). Thus it was necessary to affirm dismissal of the complaint.

For the first time during the course of rebuttal oral argument before the Court of Appeals, petitioner asked that if the decision of the District Court were affirmed the affirmance be without prejudice to the trial court's entertainment of a motion for leave to amend the complaint (App. A of Petition, p. 29). No request for leave to amend was ever made to the District Court or raised before the Court of Appeals until such rebuttal oral argument. The Court of Appeals began with the premise that, if any application to amend were made pursuant to Rule 15(a) of the Federal Rules of Civil Procedure, permission should be freely given (App. A of Petition, pp. 29-30). But it unanimously held that the record before it did not suggest the possibility of petitioner's being able to justify a stale amendment to the stale claim alleged (App. A of Petition, p. 30). On the contrary, in the very act of pleading his substantive cause of action, the pleader unavoidably alleged facts negating concealment by respondents of the alleged cause of action (App. A of Petition, p. 30). Petitioner made no attempt to seek rehearing in the Court of Appeals, but instead petitioned for certiorari.

Argument

The uniquely narrow issue in this case involves only the construction of a specific complaint to determine whether its factual allegations, viewed against the background of

the relevant procedural history, negate the possibility of fraudulent concealment. Petitioner's argument that important questions of federal common law and the general construction of Rule 15(a) call for decision by this Court is based upon a misconception of the judgment rendered in the court below. Issues respecting the availability of the *Bailey/Holmberg* doctrine in actions at law and the interpretation to be given Rule 15(a) of the Federal Rules of Civil Procedure simply are not before this Court.

I.

The federal equitable tolling doctrine is not before this Court.

Petitioner would have this Court grant certiorari to render a gratuitous opinion on the availability of the *Bailey/Holmberg* doctrine in an action at law in a federal court based on a federal right (Petition, pp. 13-15). The simple and final answer to this suggestion is that the proffered issue is not before this Court.

As petitioner's counsel candidly admit, the decision below marks the first time this allegedly important and recurring question has ever been answered by an appellate court (Petition, p. 13). Although an answer to the question was not relevant to its affirmance of the trial court, the Court of Appeals chose to consider the question in order to resolve a conflict between two divergent holdings in the trial court in the only two cases we know of where the question has been decided on the district court level (App. A of Petition, p. 21; Petition, p. 15). The question was answered favorably to petitioner. We fail to understand why this Court should take the time to

review the correctness of a dictum by the court below on a question that has never been decided by any other court of appeals.

II.

"Standards for application of Rule 15(a)" are not before this Court.

The only other reason advanced by petitioner why this Court should take the case is to announce canons of construction for Rule 15(a) of the Federal Rules of Civil Procedure (Petition, pp. 9-12). This argument incorrectly presumes: (1) That the decision below rests upon an interpretation of the Rule; and, (2) That an amendment to the complaint could in fact be made that would bring petitioner within the haven afforded by the favorable interpretation of *Bailey/Holmberg* hypothesized below.

In fact, Rule 15(a) was not interpreted by the Court of Appeals. To the extent relevant here, the Rule applies only to a party's application for leave to amend the complaint. All concerned recognized that such an application would have to be presented to, and decided by, the district court in the first instance (App. A of Petition, p. 29). No such application was ever made. Consequently the Rule, which would have governed the district court's determination of such an application while the district court had jurisdiction of the case, never was in issue.

The decision by the Court of Appeals rested upon quite a different premise. It recognized that leave to amend should be freely given, but found that, in the light of the allegations of the complaint, there was no reasonable possibility that an effective application to amend could be made

in good faith, or, stated conversely, that no amendment made in good faith could successfully allege fraudulent concealment. This factual conclusion was clearly correct, particularly if one keeps in mind that the draftsman of the original complaint must have been aware of the mandatory requirement of Rule 9(b) of the Federal Rules of Civil Procedure that "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity."

It must have been obvious to the drafter of the complaint that the first serious obstacle the pleading would have to face would be a motion to dismiss based on the statute of limitations. He also knew his only hope of avoiding the statute was to plead fraudulent concealment, and that if he intended to rely upon concealment he was required to state the underlying facts "with particularity." Accordingly, if he had any basis for alleging fraudulent concealment, he would have done so clearly and unmistakably upon filing the complaint. But the three judges of the Court of Appeals unanimously found that the complaint not only did not allege concealment, but indeed contradicted any such suggestion: "Yet the complaint not only does not allege concealment but substantially negates it" (App. A of Petition, p. 30). In view of this clear statement, it would stretch the judicial process beyond endurance to require the Supreme Court *de novo* to reexamine the 32 page complaint and attendant record to review this determination.

CONCLUSION

Far from being abused, the discretion of the Court of Appeals was carefully exercised in full accord with the highest traditions of judicial responsibility, and accordingly this petition for a writ of certiorari should be denied.

Respectfully submitted,

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June 30, 1961.